No. 1071 (34)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

■

ALEX RINKO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Alex Rinko, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The questions presented by this petition upon the issues raised in the courts below have neither been decided nor foreclosed by the decision in *Falbo* v. *United States,* 320 U. S. 549. Indeed the dictum in *Billings* v. *Truesdell,* 321 U. S. 542, 558-559 supports the substantial question here presented, namely, whether a person charged by indictment with refusal to submit to induction into the armed forces pursuant to the Selective Training and Service Act may show, in defense to the indictment, that the orders on which the charges are based are void, illegal and contrary to law. Moreover, it is asserted, if the Act and Regulations are construed so as to require a registrant, who is exempt from all training and service, to submit to induction as a condition precedent for obtaining judicial review of the illegality

of the administrative orders, that the Act and Regulations are unconstitutional. None of these issues were presented in the *Falbo* case. Furthermore, the facts in this case are entirely different. Here the petitioner has completely exhausted all administrative remedies by acceptance following examinations by the armed forces.

2. *Opinion of Court Below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record certified to this court. (325)[1]

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925.

4. *Timeliness of this Petition.*

The judgment of the Circuit Court of Appeals was entered on January 24, 1945. (329) Upon application timely made the time for filing a petition for rehearing was enlarged. (329) Within such time a petition for rehearing was duly filed. (334) The petition was denied on February 21, 1945. (330) The judgment of the court below became final on February 21, 1945.

5. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C., Appendix ss. 301-318) are drawn in question here, together with Sections 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 629.1-629.35, 633.2, 633.21, 642.41 and 642.42 of the Selective Service Regulations[2] (32 C. F. R. Supp., 601.5 et seq.) promulgated by the President.

[1] Figures appearing in parentheses throughout this petition and the supporting brief refer to pages of the printed transcript of the record on appeal.

[2] The Regulations are amended frequently. The sections are here set out as they existed when the facts in controversy took place.

6. *Constitutional Provisions Involved.*

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. *Questions Presented.*

(1) Does reporting at the induction station pursuant to the order and refusing to submit to induction after acceptance upon a preinduction physical examination and a physical examination after reporting for induction, finishing the selective process, constitute exhaustion of the administrative remedies so as to qualify defendant for defenses to the indictment that the action of the administrative board and all subsequent orders based thereon are illegal?

(2) May the petitioner who is a minister of religion under Section 5 (d) of the Act, thus exempt from all duty of training and service of any kind under the Act, show in defense to the indictment that the administrative agency acted arbitrarily and capriciously, in excess of its authority or jurisdiction, contrary to substantial evidence, without any evidence, contrary to the Act and Regulations, and in violation of petitioner's rights guaranteed by the due process clause of the Fifth Amendment to the United States Constitution?

(3) Does the record show the the administrative agency violated the substantive rights of petitioner as an exempt registrant, because there was no evidence before it showing that petitioner was not a minister of religion as established by him, contrary to the due process clause of the Fifth Amendment to the United States Constitution, the Act and the Regulations?

(4) Does the record show that the administrative agency violated the procedural rights of petitioner contrary to the due process clause of the Fifth Amendment to the United States Constitution, the Act and the Regulations in changing petitioner's classification and by failing to consider the undisputed evidence before the agency showing that he was exempt from all training and service under the Act as a minister of religion?

(5) Did the administrative agency act arbitrarily and capriciously in classifying the petitioner as liable for training and service when there was no evidence to show that he was not a minister of religion as established by the record?

(6) Since the records before the administrative agency showed that petitioner's life and full time was devoted to preaching as a missionary evangelist of Jehovah's witnesses, a recognized religious organization, was petitioner exempt from all duty for training and service under the Act because a minister of religion within the meaning of the Act and the Regulations?

(7) Does the showing by petitioner before the administrative agency that he claimed exemption under Section 5 (d) of the Act, supported by substantial evidence, amount to a challenge to the jurisdiction or authority of the administrative agency so as to require a trial de novo in the district court as to whether the action of the agency ultra vires?

(8) Since the Act and Regulations have been construed by the courts below so as to require the petitioner, who is exempt from all duty under the Act, to submit to induction as a condition precedent to judicial review and so as to penalize petitioner by denying him the right to challenge the legality of the administrative action, are said Act and Regulations void because constituting a bill of pains and penalties contrary to the bill of attainder clause of the United States Constitution, Clause 3, Section 9 of Article I?

(9) Since the Act and Regulations have been construed by the courts below so as to require the petitioner, who is exempt from all duty under the Act, to submit to induction as a condition precedent to judicial review and so as to penalize petitioner by denying him the right to challenge the legality of the administrative action, are said Act and Regulations void because denying petitioner his right to a judicial trial of his defense of no duty under the Act contrary to Article III, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution?

(10) Did the trial court err in holding that petitioner could not challenge the invalidity of the administrative action in defense to the indictment, in excluding proffered evidence, in denying petitioner's motion to dismiss, in denying petitioner's motion for a judgment of acquittal and his requests for findings of fact and conclusions of law?

8. *Statement of the Case.*

HISTORY

This criminal action was instituted in the court below by return of an indictment charging defendant with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. (2-5) The *first* count of the indictment charged that Petitioner, on April 13, 1944, failed to present himself for induction at 2229 West Chicago Avenue, Chicago. (2-3) The *second* count charged that petitioner, on April 14, 1944, failed to obey the orders of the representatives of the armed forces while at the place where induction of said petitioner was to be accomplished. (4) The *third* count charged that petitioner, on April 14, 1944, failed and neglected to perform the duty of submitting to induction. (5)

Thereafter petitioner pleaded "not guilty" on September 20, 1944. (12-13) A trial by jury was waived and the case was heard by Honorable William J. Campbell, United

States District Judge for the Northern District of Illinois. (12, 320) The trial without a jury began on September 20, 1944. (10) At the close of all the evidence, petitioner moved for a dismissal of the indictment (149-150, 238-241), a judgment of acquittal (150, 242-245), and a finding of "not guilty" (159, 238, 242), in which the reasons were stated extensively. On denial thereof, petitioner excepted. (21, 151) At the close of all the evidence, petitioner submitted to the court his requested findings of fact and conclusions of law, all of which were refused and exceptions allowed. (152-153, 155, 246-294)

The petitioner was found guilty by the court on September 21, 1944, of alleged violation of the Selective Training and Service Act of 1940, as amended. (155-157) The trial court found petitioner "not guilty" under the first count of the indictment which charged that he had failed to report for induction. (157, 295, 322) Petitioner was found "guilty" under the second count which charged him with failure to comply with lawful orders of the armed forces while at the induction station. (157, 295, 322) Petitioner was found "guilty" under the third count which charged him with failing to submit to induction. (157, 295, 322) On October 17, 1944, the United States District Judge rendered judgment upon his finding of guilty, suspended the imposition of the sentence and placed petitioner on probation for a period of two years. (159-162, 296-297, 322) The trial judge refused to commit petitioner to the custody of the Attorney General and impose a sentence for the reason that the trial judge was of the opinion that petitioner was a minister of religion, exempt from all training and service under the Act and that the draft board improperly classified him as liable for training and service. (159-162)

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. (298-301) He timely filed his assignments of error which support each ground of this petition. (301-318)

The cause was submitted on January 9, 1945 to the court

below for a decision, and on January 24, 1945 the judgment of conviction was affirmed according to an opinion filed on that date. (325) A judgment was duly entered affirming the judgment of the district court. (329) The time for filing a petition for rehearing was duly enlarged by an order of the court. (329) A petition for rehearing was timely filed. (334) It was denied on February 21, 1945. (330) On that date the judgment of affirmance became final.

FACTS

The petitioner, now 35 years of age, registered under the Selective Training and Service Act of 1940, on October 16, 1940, with Local Board No. 122, 2229 West Chicago Avenue, Chicago, Cook County, Illinois. (16, 112) He was thereupon assigned order number 819 with said board. Petitioner timely filed a Selective Service Questionnaire, answering the questions required of him, in Series VIII of which he stated that he was a minister of religion, did customarily serve as a minister, had been a minister of the Watchtower Bible & Tract Society and Jehovah's witnesses since 1932 and had been ordained and was an ordained minister of religion. (162-165) Petitioner, in said questionnaire, claimed classification of IV-D (164, 166), the classification given ministers of religion under Section 5 (d) of the Act. Petitioner showed that he devoted substantially his full time to the performance of his work as a minister of religion. (164, 166, 187-188)

The local board, on April 18, 1944, denied his claim for exemption and placed him in Class I-A, as liable for training and service in the armed forces. (18, 166) Petitioner duly and timely appealed on April 25, 1941. (18, 166) He filed a statement on appeal. (179-186) The board of appeal on July 3, 1941, upon consideration of his Cover Sheet, reversed the classification of the local board and placed him in class IV-D, thereby sustaining his claim for exemption from training and service as a minister of religion under

Sections 5 (d) of the Act. (18, 114, 167, 188-189)

Petitioner's written evidence before the draft boards, appearing in his Selective Service cover sheet, which was not disputed, at all times showed: That he was an ordained minister of the Watchtower Bible & Tract Society and Jehovah's witnesses, a religious organization, recognized by the Selective Service System, and that he had been a minister of that organization since 1932 and had been a full-time pioneer minister, devoting substantially his full time, since May 29, 1939. (164, 169-176, 178-186, 187, 191) That he was engaged primarily in carrying out his Christian duties as a minister of the gospel by engaging in evangelistic work of calling upon the people from house to house, locating people of good-will toward the work of Jehovah's witnesses and arranging for the conducting of Bible studies in the homes of the people interested in the work of Jehovah's witnesses, and by public street preaching by distribution of the literature containing Bible sermons. (192-207) That he also performed regular ministerial duties in connection with a large Chicago congregation of Jehovah's witnesses known as the North Unit of Chicago, where he each week delivered sermons and performed ministerial duties to that congregation as its minister and as assistant to the presiding elder of the congregation. (164, 192-207) That he performed all his services without commercial gain and as an ordained minister of the gospel. That he stood in the same relation to the congregation of Jehovah's witnesses as do the orthodox ministers of the recognized religious organizations. (164, 192-207) That he regularly performed duties and ceremonies as are ordinarily performed by ministers of other denominations, such as baptismal, memorial, burial and other religious ceremonies performed only by ministers. (164, 192-207) That he was recognized by the others of Jehovah's witnesses and by other persons of good-will as standing in the same relation to the Watchtower Bible & Tract Society and Jehovah's witnesses as an ordained minister of religion having same status as

orthodox clergy of religious organizations. (164, 192-207)

On April 26, 1943, the local board reopened petitioner's classification and reclassified him from IV-D to I-AO. (18, 167) He was notified on June 3, 1943. (18, 167) Within ten days petitioner requested a personal appearance before the local board and filed with the board a written appeal to the board to reconsider his classification and return to him his proper classification of IV-D. (115, 189-190) The local board notified him to appear before it for a hearing on June 14, 1943. (115, 190)

At the hearing the petitioner appeared and attempted to discuss with the local board his classification, to point out evidence which the board had overlooked, and to offer additional evidence. (115-119) The board denied a hearing completely by refusing to permit petitioner to discuss his classification, by refusing to permit him to point out evidence in the file which the board overlooked in classifying him, and by refusing him the right to offer additional oral evidence and testimony concerning his ministerial activity. (115-119) The court denied petitioner the right to show this evidence, in spite of the fact that the offer of proof showed that he had been denied his constitutional rights. (120)

Also rejected by the court and the local board were the certificates of more than sixty persons who declared that they recognized him as an ordained minister and that he devoted his full time to performance of his ministerial duties; also certificates issued by the Watchtower Bible & Tract Society and Jehovah's witnesses showing that he was an ordained minister of that organization and duly certified by it to preach as its minister, that he devoted not less than 150 hours per month to actual preaching and many more hours to preparation for his preaching activity. (118-119, 230)

The local board refused to receive or consider such written evidence tendered to it by petitioner proving his claims. (115-119, 195-208)

The local board rejected the evidence (118-119) and de-

nied his claim for exemption. (119) He appealed in writing to the board of appeal on June 16, 1943. (19, 192-195) Petitioner attempted to file evidence with the board of appeal, which was denied by the local board. (119, 192, 208-214, 231) Later the local board was directed to put the written evidence in his Cover Sheet. (208, 209-214, 231) On January 11, 1944, the board of appeal placed him in Class I-A which made him liable for military service. (19, 168, 217) Rinko was notified on January 13, 1944. (19, 168) On January 14, 1944, petitioner wrote to the State Director of Selective Service and requested him to appeal the determination to the President and to stay the induction process. (120-121, 232-234) The State Director reviewed his file (218-219) but did not take the requested action. (219-220) On January 22, 1944, and on January 25, 1944 (234), the Director of Selective Service was requested to take action in behalf of defendant by appealing the determination to the President. On a review of the cace, the Director refused to take an appeal. (221, 222, 234)

On February 15, 1944, the petitioner was commanded to appear at 2229 West Chicago Ave., Chicago, at 7:00 a.m. on February 19, 1944, to take a preinduction physical examination. (121, 168) On February 28, 1944, he was notified by his local board that he had been found "physically fit" and accepted by the Army for limited military service. (122, 168, 223) On March 3, 1944, petitioner wrote a letter to the President of the United States, reviewing his case and requesting that action be taken to redress the grievances complained of in his letter. (122, 235-237) His letter was referred to the State Director of Selective Service, who answered it on April 4, 1944, advising petitioner that no further action would be taken. (122-123)

On April 3, 1944, the local board mailed petitioner an Order to Report for Induction that commanded him to appear at the local board at 2229 West Chicago Avenue, Chicago, at 9:00 a.m. on April 13, 1944. (20-21, 124, 168, 223-224) On April 13, 1944 petitioner appeared at the local

board and delivered to the board a letter reviewing his case and stating that because of the arbitrary action of the board he refused to be inducted. (20, 124-125)

The clerk of the local board thereupon threatened petitioner and directed him to proceed to Fort Sheridan. (20, 124-125) Petitioner proceeded to Fort Sheridan and, after being examined and again found acceptable for limited military service (147-149, 226-229) he explained to the clerk at one of the desks at the induction station that he was an ordained minister and that his board had unlawfully classified him. (125-136) Thereupon the clerk took petitioner to the officer in charge at the induction station and explained the circumstances. As result of the conversation petitioner made clear to the officer in charge that he was reporting in response to the order of the board, but that he did not intend to submit to induction, that he was willing to go forward and comply with all steps except that he would not comply with the final step of submitting to induction. (34-35, 39, 125-128) He delivered to the officer in charge a letter on April 13, 1944, explaining his stand. (126-127, 225) Thereupon he was turned over to another army officer who investigated the matter further. The investigation could not be completed on the afternoon of April 13th and petitioner was requested to remain on the reservation at Fort Sheridan on the night of April 13th. (133-135) On the next day, April 14, 1944, petitioner was again taken before the commanding officer and requested to submit to induction. (49-50, 57-58, 134-135) He refused to do so and signed, at the officer's request, a statement that he refused to submit to induction. (49-50, 57-58, 134-135) After so refusing, petitioner was given a pass to leave the reservation and directed to go. (51, 54-55, 135) He returned to his home and was thereafter arrested, charged and indicted for alleged violation of the Selective Training and Service Act, as aforesaid.

Petitioner refused and failed to submit to induction because he believed that he was exempt as a minister of religion, that the board arbitrarily and capriciously classified

him, exceeded its authority and violated the Act and Regulations. Since petitioner had been accepted for duty, pursuant to the Act (135-136) he believed that the administrative selective process had been sufficiently completed so as to entitle him to challenge the legality of the classification and the action of the local board in ordering him to report for induction. (135-136)

Petitioner offered evidence that he was exempt from duty under the Act as an ordained minister of the gospel because one of Jehovah's witnesses (85-89), and that his calling was that of preaching the gospel by conducting Bible studies and giving Bible talks, and by means of preaching from house to house, as did Christ Jesus and His apostles (90-98), through distribution of literature explaining Bible prophecies showing that the time is near at hand for the complete establishment of God's Kingdom following His battle at Armageddon, now near, and in which all of Satan's organization, including political, ecclesiastical and commercial elements and all persons willingly supporting them, shall be destroyed; and that he took the same position of strict neutrality with respect to wars among the nations as did Abraham and the faithful prophets of God, and as commanded by Jehovah God, and according to the example set by Christ Jesus and His apostles, all of which evidence was excluded by the court. (85-98)

The draft board file, including the questionnaire, showed such fact that he was a minister and conscientiously opposed to combatant and noncombatant military service, and was properly entitled to exemption and classification as an ordained minister in Class IV-D and that the local board had acted capriciously and arbitrarily in classifying him in Class I-A over his objection, and had no jurisdiction to order him to submit to induction by taking the oath. (164, 169-176, 178-186, 187)

There is no written proof or evidence reduced to writing which shows that petitioner was not recognized, authorized or ordained by the Watchtower Bible and Tract Society and

Jehovah's witnesses. (85-89, 10, 176, 178-186, 187, 191) There was no evidence that he did not devote substantially all his time to the regular performance of ministerial duties in behalf of said organization. There was no evidence that he did not perform the religious ceremonies and duties. There was no evidence that the Watchtower Bible and Tract Society did not recognize petitioner as standing in relation to it as do the ministers of the orthodox religious organizations. (164-176, 178-186, 187, 191) There was no evidence that petitioner did not follow this profession, devote his time and preach at all times shown in his papers before the board and in the manner described by him therein. There was no written evidence in the file disputing the facts stated by him in Series VIII of the questionnaire and in the other documents filed with the board in reference to his ministerial activity. There was no evidence in the file in writing which showed that petitioner falsified his claim as a minister or that he falsely impersonated a duly recognized minister of the recognized religious organization known as Jehovah's witnesses. (85-89, 164-176, 178-186, 187, 191)

How Issues Were Raised

By oral argument to the court and by requests for findings of fact and conclusions of law, petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and order made by the draft boards. (62-83, 146-147, 292-294) He contended that if the right to urge this defense was denied him, a construction had been placed upon the Act and Regulations which made them unconstitutional. (62-83, 146-147, 292-294) Petitioner alleged that they were void because:

(1) They constitute a bill of attainder, contrary to Clause 3 in Section 9 of Article I of the United States Constitution.

(2) They surrender the judicial powers to the draft board, contrary to Article III of the Constitution.

(3) They deny the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment.

(4) They permit conviction without evidence of guilt and upon hearsay evidence, and deny right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments. (146, 292)

The trial court, by oral opinion, and by finding petitioner guilty, overruled each and all of these contentions and held that acceptance by the armed forces upon a preinduction physical examination, and upon physical examination at the army induction station, did not complete the administrative process and petitioner had not exhausted his administrative remedies until he had submitted to induction pursuant to the order. (65, 81-82, 156-157) Exception was allowed to this holding. (6, 7, 89) The court denied the written requested conclusions of law. (155)

By the offer of testimony from witnesses acquainted with the ministerial activity of petitioner since 1939, it was sought to prove that he was exempt as a minister of religion and that he regularly performed his duties as such. (89-93, 93, 94, 95, 95-97) This was excluded with exception to petitioner. (8-10, 92, 95, 96, 97) Enlarged bill of exceptions is in the record. (6, 8, 97) Also by offer of testimony from Rinko and the chairman of the local board; and from the chairman of the board of appeal it was sought to prove that the boards had violated the Act and Regulations and denied petitioner his constitutional rights. (85, 89, 116-117, 118-120) This was excluded by the court with exception. (7-8, 89, 118-120) Enlarged bill of exceptions is in the record. (6, 7, 89) Petitioner offered to show that the local board denied him a hearing contrary to the Act and Regulations. (115-120) This evidence was refused by the court with exception to the petitioner. (8-10, 120)

At the close of the evidence, petitioner moved for a finding of "not guilty" (150), a dismissal of the indictment (150,

238-241), for entry of a judgment of acquittal (150, 242-245) and requested findings of fact and conclusions of law (246-294), on the grounds that the undisputed evidence showed that the draft board order was void because petitioner was a minister of religion exempt from all training and service and that the boards had no authority to classify him as liable for training and service or to order him to report. (238-241, 242-245, 246-294) Each reason asserted in the requested findings, conclusions and rulings was reiterated in the motions for dismissal and judgment of acquittal. (238-245) Each motion and request was denied with exception to petitioner. (150, 322)

The court held that the classification was binding upon the petitioner, and the court (65, 81-82, 156-157), that the petitioner could not challenge the same on the ground that he was exempt as a minister (65, 81-82, 156-157); and that his failure to submit to induction was a wilful violation of the Act. (65, 81-82, 156-157) He objected to the court's holding because he had exhausted his administrative remedies and was in position to challenge the classification and order on which the indictment was based, and that the court's holding denied him his right to defend on the ground that he had no duty because exempt as a minister. (6-10, 62-82)

Petitioner's requests for rulings and findings urging that the classification and the order thereon were illegal and void were refused, with exception to petitioner. (155, 322) The requests, in the terms of the Act and Regulations, defined what constitutes a regular or a duly ordained minister of religion (253-263, 265-266), also stated the duties of the draft boards in considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. (264, 270, 278-287) The court was requested to hold, conclude and find that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses (246-250, 251-252) and there was no substantial evidence that he was not such min-

ister as claimed (268, 271, 276); that the boards had no right to reopen Rinko's case and change his classification (274-275); that the court could find that the draft boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations, and arbitrarily and capriciously; thereby rendering a verdict of "not guilty" if the court so found. (277, 288-290)

Having fully proved that he was a regular and duly ordained minister of religion, the draft boards were without jurisdiction to order or require him to obey any instructions they might undertake to give him. A minister is classified before physical examination, as shown by Section 623.21 of the Regulations, and petitioner was therefore under no obligation to obey an order to submit to induction by taking the oath. He was under no duty of any kind except to register and return his Questionnaire with the information that he was a minister. After he had done that, the draft boards had no jurisdiction to order him to do anything further. However, he complied with all lawful orders of the board that did not require him to waive and surrender his rights as a minister and citizen. He complied with the preinduction physical examination order (20-21, 124-125) and was accepted by the armed forces at such examination. (20-21, 124-125, 168, 226-229)

The fact that petitioner was conscientiously opposed to combatant and noncombatant military service and that the trial court or appellate court or any judge thereof might have the private opinion that he does not measure up to the standards of an orthodox minister of the recognized religious denominations, does not affect in any way the substantial legal questions presented herein. The point urged in this petition is that the administrative process was exhausted so as to entitle petitioner to judicial review because he had been declared acceptable after having taken a preinduction physical examination (62-81), and

after being again accepted at the induction station. (226-229) When he reported for induction at the local board (20-21, 124-125) and at Fort Sheridan (20-21, 124-125), he declined to submit to induction by taking the oath. (125-136) The petitioner was in a position to show in defense to the indictment that he was exempt as a minister of religion. It was the duty of the trial judge to pass upon this defense, or at least it was his duty to determine whether or not petitioner was exempt as a minister of religion. The trial judge not only refused to pass upon this question, but also restricted the issue to whether petitioner submitted to induction. (65, 81-82, 156-157) The acts and conduct of the trial judge violated petitioner's rights and liberty to make the defense in violation of the due process clause of the Fifth Amendment and thereby converted the Act and Regulations into a bill of attainder. (62-83, 146-147, 292-294)

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction.

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and seriously affect the life, liberty and rights of thousands of persons exempted from all training and service under the Selective Training and Service Act.

The question as to when, where and how a registrant may raise in court objections to the legality of an induction order because of failure to accord him the rights guaranteed to him under the Constitution, the Act and the Regulations has not been settled by this court. It is of such great importance that it should be definitely settled now. *United States* v. *Pitt*, 144 F. 2d 169, at page 173, a decision of the court of appeals for the second circuit indicates it is an open question. In this case petitioner contends that he completed his administrative remedies upon acceptance by the armed forces following a physical examination provided by

the Regulations. (Regs. 629.11-629.32, 633.21-633.22) In *Falbo* v. *United States,* 320 U. S. 549, at page 553 this court said that the selective process ended when the registrant was accepted for service. This statement was iterated in *Billings* v. *Truesdell,* 321 U. S. 542, 546, which held that induction is not a part of the selective process, that there is a distinction between "being found acceptable and induction", and that induction was the end product which followed the conclusion of the selective process. (See pages 553 to 556 of the opinion.) The *Falbo* decision held that Falbo could not challenge the legality of the order to report on which the indictment was based because he had not completed his administrative remedies by being found acceptable. The court held that he may have been rejected had the selective process been completed. Here the petitioner has been accepted by the armed forces and finished the selective process. The dictum of the *Billings* decision indicates that petitioner, who followed that procedure, may challenge the legality of his classification in the courts. (See pages 558 and 559 of the opinion.) Therefore, this is an important question which should be settled by this court.

The decision of the court below that petitioner had not exhausted his remedies so as to entitle him to judicial review of the illegality of the administrative orders is in conflict with the statement of the United States Circuit Court of Appeals for the Fourth Circuit in the case of *United States of America ex rel Hoce* v. *McGinnis,* decided December 6, 1944. In that decision the court said that investigation of a draft board order where the registrant had complied with it to the extent necessary to secure review "is a matter to be considered on the hearing of the criminal charge." Compare *Goff* v. *United States,* (C. C. A. 4th) 135 F. 2d 610, where it was said if the administrative action was arbitrary, capricious or the registrant's constitutional rights had been violated that such illegality could be shown in defense to the indictment. Even where the administrative selective process has been exhausted by acceptance upon a physical

examination other courts have held that there can be no judicial review of the illegality of the draft board orders. *Goodrich* v. *United States,* (C. C. A. 5th) 146 F. 2d 170. Compare *United States* v. *Flakowicz,* (C. C. A. 2d) decided January 22, 1945, and *United States* v. *Pitt,* 144 F. 2d 169. These decisions are strong evidence of the tendency on the part of the lower courts to pervert the holding of this court in *Falbo* v. *United States,* 320 U. S. 549. These courts argue that this Court held in the *Falbo* decision that the only judicial review of illegal action of a draft board is by habeas corpus following induction, and that there is no defense whatever to an indictment under the Act, even when the registrant has exhausted his administrative remedies. Not only is there confusion among the lower courts as to what the rights of a registrant are when charged with a violation of the Act, but it is plain that the present trend of the decisions supposedly based on this Court's decision in the *Falbo* case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power to halt the further spread of the erroneous doctrine.

The challenge to the administrative orders in this case goes deeper than an attack against the mere propriety of the boards' classification. Here the Court is called upon to consider whether the administrative agency violated the rights and liberty of petitioner contrary to the due process clause of the Fifth Amendment and the specific provisions of the Act and Regulations. Accordingly questions stronger than, but analogous to, those presented to the Court in *Giese* v. *United States,* No. 192 October Term 1944, decided January 8, 1945, 65 S. Ct. 437, are here urged upon the Court.

The decision of the court below upon the constitutional objections to the Act and Regulations has been made in a way probably in conflict with applicable decisions of this Court, so as to justify the granting of the writ of certiorari. The constitutional questions and the applicable decisions

are set forth below. These constitutional objections are based on the construction placed on the Act and Regulations so as to require petitioner, who is an exempt registrant, to comply with all illegal orders of the administrative agency as a condition precedent to judicial review and to penalize petitioner by denying him judicial review because he refused to submit to the illegal order to join the armed forces.

The construction placed on the Act and Regulations has converted them into a bill of pains and penalties contrary to the United States Constitution, Clause 3, Section 9 of Article I, which prohibits the enactment of a bill of attainder. The applicable decisions of this court on this question are: *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *Fletcher* v. *Peck,* 6 Cranch 137. *Kentucky* v. *Jones,* 10 *Bush* (70 Ky.) 725, although not a precedent, is a decision directly in point. The analogy is supported by history of bills of pains and penalties and bills of attainder. Compare Wooddeson, *A Systematical View of the Laws of England* (1777), pp. 621-648; *The Catholic Encyclopedia,* Vol. II, p. 59; *Encyclopædia Britannica* (1942 ed.) Vol. 2, p. 656; Cooley, *Constitutional Limitations,* 8th ed.; Vol. 1, pp. 536-539; Story's *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216; and Watson's *The Constitution of the United States* (Callaghan & Co., 1910), Vol. 1, pp. 736-737.

The above described construction of the Act and Regulations that judicial review of an illegal final order of an administrative agency upon which an indictment is based is not available as a defense to one who has exhausted his administrative remedies is in direct violation of the due process clause of the Fifth Amendment. The holding of the court below, based on this construction, conflicts with the following applicable decisions of this court. *California* v. *Latimer,* 305 U. S. 255, 261; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 412-414; *Dayton Goose Creek R. Co.* v. *United States,* 263 U. S. 456, 486; *Ohio Valley Water Co.* v. *Ben*

Avon Borough, 253 U. S. 287, 289. Inasmuch as the holding has sanctioned denial of the right of the petitioner to prove that he had no duty for training and service under the Act, that the action of the agency is ultra vires, and that the orders were void, the courts below have violated the rights guaranteed an accused in criminal cases secured by the Fifth and Sixth Amendments to the United States Constitution. This construction is in conflict with applicable decisions of this Court. See *McVeigh* v. *United States*, 11 Wall. 259, 267; *Windsor* v. *McVeigh*, 93 U. S. 274; *Dowdell* v. *United States*, 221 U. S. 325, 330; *Edwards* v. *United States*, 312 U. S. 473; *United States* v. *Stevenson*, 215 U. S. 190, 199; *Rogers* v. *Peck*, 199 U. S. 425; *Ong Chang Wing* v. *United States*, 218 U. S. 272, 279; *Wong Wing* v. *United States*, 163 U. S. 228; *Hovey* v. *Elliott*, 167 U. S. 409, 413-418.

The holding of the court, insofar as it is based upon the construction that one must submit to induction as a condition precedent to judicial review, requires the petitioner, who reported for induction to exhaust his administrative remedies, to be subjected to more severe penalties than the registrant who stays away entirely. *United States* v. *Mroz*, 136 F. 2d 221; *United States* v. *Van Den Berg*, 139 F. 2d 654; *United States* v. *Messersmith*, 138 F. 2d 599; and *United States* v. *Sauler*, 139 F. 2d 173. Compare *United States* v. *Grieme*, 128 F. 2d 811. Such holding is in direct conflict with the holding of this court in *Billings* v. *Truesdell*, 321 U. S. 542, at pages 558 and 559. It also collides with the decisions of this court in *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, at pages 660-663; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, which are based on *Ex parte Young*, 209 U. S. 123 at page 147.

The holding of the court below that the order cannot be attacked because not complied with is in conflict with applicable decisions of this court holding that if the Government invokes the judicial process to enforce its fiats the proceedings become sufficiently severed from the original proceedings as to command judicial review. *Cobbledick* v.

United States, 309 U. S. 323; *In re Burrus*, 136 U. S. 586; *Ex parte Fisk*, 113 U. S. 713, 718; and *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.

Permitting due process of law by defense to an indictment based on an illegal order of a draft board whereby petitioner, who is exempt from all duty under the Act, shows that his rights have been violated contrary to the Act, the Regulations and the Constitution by the board does not constitute a real, substantial and immediate danger against the safe prosecution of the war. Accordingly a holding that it does is in conflict with *Schenck* v. *United States*, 249 U. S. 47, at page 52; *Bridges* v. *California*, 314 U. S. 252; and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at pages 638 to 640. Compare the cogent argument of Mr. Justice Murphy in his dissenting opinion in *Falbo* v. *United States*, 320 U. S. 549, and the judgment of Mr. Justice Darling in *Chester* v. *Bateson*, 1920, (C. A.) 1 K. B. 829 discussing the English Defense of the Realm Act, orders in council promulgated thereunder, and judicial review thereof.

The holding of the court that the order of the administrative agency commanding the petitioner, exempt from all duty of training and service becuase a minister of religion under Section 5 (d) of the Act, to submit to training and service under the Act was not in excess of its jurisdiction, not ultra vires, not contrary to the Act and not repugnant to the Regulations is in direct conflict with applicable decisions of this court in *Wise* v. *Withers*, 3 Cranch 331; *Burfenning* v. *Chicago St. P. R. Co.*, 163 U. S. 322, 323; *Ng Fung Ho* v. *White*, 259 U. S. 276, 284; *Kessler* v. *Strecker*, 307 U. S. 22, 34-35; *Yonkers* v. *United States*, 320 U. S. 685; *United States* v. *Idaho*, 298 U. S. 105, at pages 109 to 110. Moreover this holding of the court below is a "decision in conflict" with the holding of another circuit court of appeals on the same question. See *Lehr* v. *United States*, (C. C. A. 5th) 139 F. 2d 919, at pages 921 and 922, where the court held that the draft boards did not have jurisdiction or authority to induct

a minister of religion into the armed forces contrary to Section 5 (d) of the Act. Compare *Trainin* v. *Cain* (C. C. A. 2d) 144 F. 2d 944.

Moreover there is presented on this petition an important question of federal law which has not been, but should be, settled by this court. That question is the extent of judicial review allowed by law to be exercised by the courts over the actions, findings, and orders of draft boards. The decisions of the various circuit courts of appeals are in irreconcilable conflict as to the scope of review of actions, findings and orders of such administrative agency.[3]

Petitioner asserts that upon many of the issues presented the courts below have decided important questions of federal law which decisions are not in accord with applicable decisions of this court. On other questions the courts below have decided important questions of federal law and constitutional law which have not been, but should be, settled by this court. It is also claimed that upon all these questions presented the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. Additionally, on some of the questions, the courts below have rendered decisions in conflict with the decisions of other circuit courts of appeal on the same matters. It is accordingly submitted that this case is one calling for the exercise of this court's supervisory powers under the statute and the rules of this court.

[3] The Second Circuit applies the rule as to whether there is "any evidence" to support the finding. *Trainin* v. *Cain*, 144 F. 2d 944; compare *Angelus* v. *Sullivan*, C. C. A. 2d, 246 F. 54, 63 where it is said to be whether the board acted in excess of its jurisdiction or acted unfairly. The Third Circuit limits the inquiry to whether or not the board allowed a hearing. *Ex parte Stanziale*, 138 F. 2d 312, 313-315. Compare also Crutchfield v. United States, C. C. A. 9th, 142 F. 2d 170, 173-4. The Sixth Circuit has said it was a question of whether there is "substantial evidence" to support a finding. *Rase* v. *United States*, 129 F. 2d 204, 207; but compare *Checinski* v. *United States*, 6 Cir., 129 F. 2d 461, 462. For a further discussion of the conflicts see *Trainin* v. *Cain*, supra, and *Hull* v. *Stalter*, decided February 9, 1945 by the United States District Court for the Northern District of Indiana sustaining a petition for writ of habeas corpus brought by one of Jehovah's witnesses.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of the said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or in the alternative the judgment be reversed and the cause remanded for a new trial not inconsistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

ALEX RINKO, *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

PRELIMINARY

For a statement showing the opinions of the courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

ONE

Acceptance by the armed forces upon the preinduction physical examination and the subsequent appearance of petitioner at the local board and induction station pursuant to the order, where he declined to submit to induction, completes the administrative process so as to permit judicial review of the illegal classification in defense to the indictment, based on his failure to submit to induction.

The Selective Training and Service Act of 1940 (Section 3a) in part provides:

> " . . . no man shall be inducted for training and service under this Act unless and until he is *acceptable* to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: . . . [Italics added]"

The administrative process beginning "with registration with the local board" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp". *Falbo* v. *United States,* 320 U. S. 549.

Under the Regulations as amended in January, 1944, there was no opportunity for a change of classification by the local board after acceptance of petitioner for the armed forces. The order to report commanded him to submit to induction. He was examined at the induction center at Fort Sheridan and it appeared that there had been no change in his physical condition. His acceptance was continued.

Section 629.1 of the amended Regulations provides:

> "*Who will be examined.* (a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provision of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent."

Section 629.2 among other things provides:

> "(b) The local board shall mail an Order to Report —Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I-A or Class I-A-O under the provisions of section 623.21 to fill each Call . . . which it receives."
>
> "(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I-A, Class I-A-O, or Class IV-E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service."

Section 629.21 of the amended Regulations sets forth the duty of the registrant to report for and submit to the preinduction physical examination. It should be observed that petitioner here did report for and submit to the physical examination and was thereafter declared *acceptable.*

Section 629.31 provides:

"(a) After preinduction physical examination, . . .

(a) . . . The armed forces will stamp at the top of page 1 of the Original, the First Copy, and the Second Copy of the Report of Physical Examination and Induction (Form 221) either 'Army—General Service,' 'Army—Limited Service,' or 'Navy' except when the registrant is rejected or his status is not finally determined because of incomplete records or serology which is not satisfactory. . . .

"(b) After completing the records in the manner provided in paragraph (a) of this section, the induction station will return all records to the local board."

Section 629.32 provides:

"Mailing Certificate of Fitness to registrant accepted or rejected. When a Certificate of Fitness (Form 218) indicates that a registrant has been accepted for the Army or the Navy or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40)."

In this case, on February 19, 1944, the armed forces, at conclusion of the preinduction physical examination, *accepted* petitioner for military service. Report of such *acceptance* was made on behalf of the armed forces in due form to the local board. Thereafter the local board notified petitioner of his *acceptance* for military duty and ordered him to report for induction.

When petitioner was ordered to report for and submit to induction into the armed forces, and he appeared both at the local board and at the induction station and refused to submit to induction, he was at that time in exactly the same position as was Billings in the *Billings* case, supra, after he

had been examined and found acceptable and ordered to submit to induction.

Billings refused to submit to induction.

Petitioner here refused to submit to induction.

The lower court's opinion, reduced to its lowest factor, holds, on the authority of the *Falbo* case, that the legality of the draft boards' proceedings and orders cannot be challenged in any manner in the courts until actual induction has been completed. The *Billings* case is said to be wholly irrelevant to any issue presented by petitioner. Both of these conclusions are erroneous, and both grow out of an inadequate cognition of one key sentence appearing on page 558 of the *Billings* opinion, to wit:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

The difference between the construction placed on this sentence by the court below and the position of petitioner, may be illustrated by interpolating the sentence and viewing it in parallel form:

"Moreover, it should be remembered that he who reports at the induction station [*for induction*] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."	"Moreover, it should be remembered that he who reports at the induction station [*to determine acceptance by preinduction physical examination*] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

If the interpolated sentence appearing at the left above represented a correct statement of what this Court said in the *Billings* case, then petitioner would readily concede that

the Court had verily closed the door of the judiciary to all registrants who had not submitted to induction, as the court below says it has done. But in truth and in fact this Court has not held in the *Falbo* case that a registrant must first submit to induction before he can obtain judicial review of his rights under the Selective Training and Service Act. The interpolated sentence appearing at the right above truly expresses the holding of the *Billings* case and undeniably constitutes a clarification of the crucial question in the *Falbo* case, which was simply this: "At what point in the selective process can it be said that a registrant has exhausted his administrative remedies so as to entitle him to judicial review of the legality of the selective process?" An examination of the words in the *Billings* opinion will show beyond question that this Court has answered this question by drawing the line for the exhaustion of administrative remedies squarely between the separate and distinct steps of *"acceptance"* upon preinduction physical examination and actual *induction*. The significant words of the *Billings* opinion are set forth immediately after the quotation from the *Falbo case:*

Falbo

"The connected series of steps into the national service which begins with registration does not end until the registrant is *accepted* by the army, navy, or civilian public service camp." *Falbo* v. *United States,* 320 U. S. 549, 553.

Billings

"Sec. 3 of the Act, 50 U. S. C. A. Appendix, s. 303 provides that 'no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined.' [p. 546]

* * *

"The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction. [p. 553]

• • •

"*These regulations thus suggest that induction follows acceptance and is a separate process.* [p. 554]

• • •

"This takes the place of the earlier system whereby selectees were first inducted and then given, if they desired, furloughs to attend to their personal affairs. [p. 555]

• • •

"We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station. [p. 555]

• • •

"But induction under the Act and the present regulations [those involved in the *Rinko* case] is the end product of submission to the selective process and compliance with the orders of the local board. [p. 556]

• • •

"Moreover, it should be remembered that he who reports at the induction station [for acceptance on preinduction physical examination] is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. *Unless he follows that procedure he may not challenge the legality of his classification in the courts.* But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report [for acceptance on preinduction physical examination] he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case

by subjecting those who reported for completion of the Selective Service process [i.e., acceptance on preinduction physical examination] to more severe penalties than those who stayed away in defiance of the board's order to report." [p. 558, 559]

In considering the language just quoted, it must be kept in mind that Billings was required to report at the induction station under the old regulations which provided that induction should immediately follow the acceptance on preinduction physical examination. In order to preserve Billings' right to follow the procedure outlined in the *Falbo* case [i.e., complete the "selective process" by being accepted upon the final or "preinduction" physical examination] and thereby put himself into position to obtain judicial review of his claim that the boards' treatment of his statutory and constitutional rights was illegal, it was necessary for the Court to say, as it has, that his mere reporting to the induction station to submit to the preinduction physical examination could not of itself constitute induction, because such would defeat the very purpose of his submitting to this examination in that it would take him out of the jurisdiction of the civil courts and put him under the military tribunals, thereby depriving him of the benefit of Senator Bone's amendment to Section 11 of the Act which provides for the prosecutions of Selective Service violators in the civil and not military tribunals. As this Court observed, any other view would indeed make a "trap" out of the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies, in that it would require a registrant to exhaust his administrative remedies by being accepted on preinduction physical examination in order to obtain judicial review of his grievances in the civil courts, and then, by his very act of submitting to this examination, allow him to be taken out of civil jurisdiction altogether and put him under military jurisdiction. No other satisfactory explanation of these words has been advanced or can be advanced. Certainly the view taken by the government, in the instant

case, that a registrant must be actually inducted before judicial review is possible, makes this Court's words above quoted entirely meaningless; for what would be the purpose in "exhausting his administrative remedies" if, after having done so, he would still be denied the right to judicial review on the ground that he had not submitted to induction? If the government's view is correct, then the registrant who stays away from the preinduction physical examination altogether would be in no worse position than he who reported to the induction station for the examination as outlined in the *Falbo* case, and this is precisely the dilemma this Court sought to avoid creating in the *Billings* decision. If this be not the case, then words no longer have any meaning and no credence can be placed in any sober declaration in the English language.

The record in the *instant* case and the above quoted plain language of the *Billings* opinion, requires this Court to declare just what it did decide in the *Falbo* case. Had the court below made the close investigation of the *Falbo* opinion that the situation deserved, instead of relying on other decisions of the circuit courts holding contrary to the *Falbo* rule (most of which were decided before the *Falbo* case) then it could not have failed to perceive that the *Falbo* case simply and definitely held that one indicted for failure to complete the *selective process* could not defend his action by challenging the legality of the order because he had not exhausted all his administrative remedies within the selective system. The *Falbo* decision turned squarely on the point that Falbo might have been rejected when he reported at the Civilian Public Service Camp and was given the equivalent of what is now the "preinduction physical examination" which would have determined his acceptability for service. See footnote 7, p. 553, in the *Falbo* opinion. In the *Falbo* case it was held that the "connected series of steps" which begins with registration, "does not end until the registrant is *accepted* by the army, navy or civilian public service camp." (p. 553) Thus it is clear that

had Falbo completed the "selective process" by being *accepted* upon taking the final physical examination (now termed "preinduction physical examination") he would have exhausted his administrative remedies under the Act and thereby entitled himself to judicial review of his contention that the draft boards proceeded illegally.

Contrary to the holding of the court below Mr. Justice Douglas, in the *Billings* opinion (p. 558) describes the Court's ruling in the *Falbo* case as a 'procedural decision'. But entirely aside from statements made in the *Billings* case concerning the *Falbo* decision, it is manifest that the "Falbo rule" is nothing more than an application of the familiar procedural rule of law denying judicial review of administrative determinations when there has been a failure to exhaust the remedies within the administrative system. Certainly it cannot be contended that induction is an administrative remedy. It is the satisfaction of the final order of the agency, in much the same way as is the payment of a judgment of a court. If satisfaction of the administrative order is now required to entitle one to judicial review, then, indeed, a new theory heretofore unheard of, has been grafted onto administrative law. No such requirement is made as a condition to judicial review of any other administrative order. Why the innovation without just cause and excuse in this case?

That part of the *Falbo* decision to the effect that 'a prompt and unhesitating obedience to orders issued in the selective service process is indispensable to the complete attainment of the object of national defense' does not refer to that which the court below apparently supposes that it does. This Court was expressly referring to the many intermediate steps that make up "the selective service process" and these words cannot be stretched into an inclusion of the separate and final step of induction. How else beside in this manner can Justice Black's words in the *Falbo* opinion be explained: "Surely if Congress had intended to authorize interference with that [selective service process]

by *intermediate* challenges of orders to report [for preinduction physical examination and similar interlocutory commands] it would have said so.

" . . . It is certain that Congress was not required to provide for judicial intervention before *final acceptance* of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the *selective process* [which is, as above appears, final acceptance on physical examination]."

If there was ever any doubt as to whether the Court, by its use of the phrase "final acceptance", was referring to acceptance upon final physical examination or acceptance by actual induction, that doubt was removed by the explanation made in the *Billings* opinion (p. 554) wherein it was clearly stated *"induction follows acceptance and is a separate process"*. The lower court's error in disposing of the *Falbo* case is that it has confused and confounded the word "acceptance" used in the *Falbo* opinion with *"induction"*. It is not disputed that Rinko had been finally "accepted" for service in the armed forces when he had completed his final or "preinduction" physical examination. This clearly distinguishes his case from the "narrow question" presented in the *Falbo* case. The conclusion is inescapable: Rinko has been denied his lawful right to the judicial review of the substantive questions raised by him in the trial court.

TWO

It is not necessary for petitioner voluntarily to submit to induction and become a member of the armed forces as an inductee in compliance with the orders upon which the indictment is based because such is to require him to perform a vain, idle and immaterial act as a condition precedent to judicial review of the illegal classification.

This point has been thoroughly discussed under Point One of the Brief filed in Support of the Petition for Writ of Certiorari in the case of *Clayton* v. *United States,* No. 886, October Term 1943, at pages 16 to 23, inclusive, and reference is hereby made to same. Reference is also made to Petitioner's main brief in the case of *Falbo* v. *United States,* No. 73, October Term 1943, at pages 39 to 58.

THREE

The Act and Regulations have been converted into a Bill of Attainder contrary to Clause 3, Section 9 of Article I of the United States Constitution because they have been construed to require petitioner, an exempt registrant, to submit to induction as a condition precedent to judicial review and penalize petitioner who failed to submit to induction by denying him the right to test the illegality of the administrative classification purporting to fix his duty under the Act and Regulations.

This point has been thoroughly discussed under Point Three of Brief filed in Support of the Petition for Writ of Certiorari in the case of *Clayton* v. *United* States, No. 886, October Term 1943, at pages 39 to 70, inclusive, and reference is hereby made to same.

FOUR

Construction of the Act and Regulations so as to require petitioner to submit to induction after the process of selection has been completed, as a condition precedent to obtaining judicial review, is contrary to the Fifth and Sixth Amendments to the United States Constitution.

This point has been thoroughly discussed under Point Three of Brief filed in Support of the Petition for Writ of Certiorari in the case of *Lohrberg* v. *Nicholson,* No. 884, October Term 1943, at pages 63 to 75, inclusive, and reference is hereby made to same.

FIVE

In defense to the indictment the petitioner should have been allowed to show, and the court should have considered, that the order upon which the indictment was based is void because petitioner is a minister of religion exempt from all duty of training and service, for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations.

This point has been thoroughly discussed under Point Two of the Brief filed in Support of the Petition for Writ of Certiorari in the case of *Lohrberg* v. *Nicholson,* No. 884, October Term 1943, at pages 48 to 63, inclusive, and reference is hereby made to same.

SIX

The trial court erred in refusing to grant petitioner's motion for dismissal and for a judgment of acquittal, made at the close of all the evidence, because the undisputed evidence showed that petitioner was exempt from all training and service under the Act because a duly ordained minister of religion under Section 5 (d) of the Act; therefore the final classification and order were without authority of law, in excess of the jurisdiction of the draft boards, arbitrary and capricious.

This point has been thoroughly discussed under Point Two of Petitioner's Main Brief in the case of *Falbo* v. *United States,* No. 73, October Term 1943, pages 66 to 96, inclusive, and reference is hereby made to same.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed, and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioner

INDEX

CITATIONS

640231—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1071

ALEX RINKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 325–328) is reported at 147 F. 2d 1.

JURISDICTION

The judgment of the circuit court of appeals was entered January 24, 1945 (R. 329), and a petition for rehearing was denied February 21, 1945 (R. 330). The petition for a writ of certiorari was filed March 23, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether petitioner may challenge the propriety of his Selective Service classification as a defense in his criminal trial for refusing to comply with the instructions of officials at the induction center and for refusing to submit to induction.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940 and the applicable provisions of the Selective Service Regulations are set forth in Appendix A, *infra*, pp. 12–14.

STATEMENT

On June 30, 1944, petitioner was indicted in the United States District Court for the Northern District of Illinois in three counts charging violations of the Selective Training and Service Act of 1940 (R. 2–5). Count 1 charged that he wilfully failed to report for induction into the armed forces; count 2, that he wilfully failed to obey the orders of representatives of the armed forces at the induction station; and count 3, that he wilfully failed to submit to induction. Having waived a trial by jury (R. 11–12), petitioner was tried by the court and was convicted on counts 2 and 3 (R. 157). Imposition of sentence was suspended and petitioner was placed on probation for two years (R. 296–297). Upon appeal to the Circuit

Court of Appeals for the Seventh Circuit, the judgment was affirmed (R. 329).

At this trial petitioner sought to predicate his defense on the contention that, as a Jehovah's Witness, he was a minister of religion and that he had been improperly denied classification as such. The district court, relying on *Falbo* v. *United States,* 320 U. S. 549, permitted petitioner to make an offer of proof, but declined to receive the proposed evidence on the ground that the propriety of petitioner's Selective Service classification could not be challenged in the criminal trial (R. 81–82, 155–156). The evidence in support of the judgment may be briefly summarized as follows:

Petitioner, a citizen of the United States (R. 164), registered under the Selective Training and Service Act of 1940 on October 16, 1940, with Local Board No. 122, Chicago, Illinois (R. 16). He executed his Selective Service questionnaire on March 26, 1941 (R. 162–168). In his questionnaire, petitioner stated that he was born November 10, 1909 (R. 164); that his education consisted of eight years of elementary school and four years of high school (R. 162); that he was married and had no children (R. 164); that he had been a "minister" of the Watchtower Bible and Tract Society since November 22, 1932, the date of his ordination (R. 164); that his occupation was preaching the Gospel of God's Kingdom

from house to house (R. 163); that he had worked as an armature winder from 1927 to 1939 (R. 163); and that he was a conscientious objector to both combatant and noncombatant military service (R. 165). After having been classified and reclassified on several occasions, petitioner was classified I–A–O (available for noncombatant military service) by his local board on April 26, 1943 (R. 19, 167). He appealed to his board of appeal and was unanimously classified I–A by that board (R. 19), after he had advised the board that he would refuse a conscientious objector's classification and would accept only a classification as a minister of religion (R. 216). Upon complaint by petitioner that he had been improperly classified by the board of appeal, his file was forwarded to the National Headquarters of the Selective Service System. That office reviewed petitioner's file and concluded that "further action on this case by National Headquarters is not deemed necessary in the national interest nor to avoid an injustice." (R. 221.) Petitioner thereafter reported for a pre-induction physical examination as directed by the order of his local board, and he was found physically acceptable by the armed forces (R. 19–20, 223). On April 3, 1944, he was ordered to report for induction on April 13, 1944 (R. 20). On the morning of April 13 petitioner reported to his local board and gave the clerk a letter stating in substance that he refused to be inducted

into the armed forces (R. 20, 225). Together with other prospective inductees, he was transported to Fort Sheridan, Illinois, the induction station (see R. 20).

The events at the induction station were shown by the testimony of Major Bellis, who was the commanding officer of the induction station when petitioner appeared there. The Major described the various steps preliminary to induction which selectees were required to take to enable the Army finally to determine their acceptability and induct them. He testified that there were various stations at the induction center to which a selectee was required successively to report to obtain materials, to furnish information, to undergo a physical inspection, to be blood-typed, to assist in making up his roster, to furnish information for filling out a form for the local board, and to be fingerprinted. Thereafter, if the selectee was accepted, he was taken to the ceremonial room where the induction ceremony was had. (R. 30–32.)

Petitioner proceeded to undergo this processing, but when he reached the station where Section 3 of Selective Service Form 221 was to be completed, he refused to participate in the processing any further. Major Bellis testified that a selectee who would not furnish the data required in completing that form "definitely" would not be acceptable to the Army. (R. 32–34.) At this point

there remained three additional stations before the processing would have been completed (R. 34–35). Petitioner was thereupon taken to Major Bellis' office, and he told the Major that he had been improperly classified by his local board and that he refused to go further in the line. The sanctions of the Selective Training and Service Act were explained to petitioner, but he advised the Major that he still refused to proceed with the processing. He was requested to make a written statement to this effect, which he did, stating that he refused to be inducted into the armed forces because he was a minister of religion. (R. 34–35, 38, 229.) Major Bellis then directed petitioner to report back to his local board (R. 51); petitioner did not do so (R. 23).

ARGUMENT

1. Petitioner principally contends (Pet. 17–20, 25–34) that the trial court erred in refusing to review the propriety of his Selective Service classification in his criminal trial. The contention rests upon his assumption that a selectee who refuses to complete the induction process, but whose acceptability for service has been finally determined, is entitled collaterally to attack his Selective Service classification as a defense in a criminal prosecution for failing to perform the duties required of him under the Act and regulations. In our view, and in the view of the lower federal courts which have passed upon this ques-

tion, the rationale of this Court's decision in *Falbo* v. *United States,* 320 U. S. 549, precludes such an argument.[1] Rather, a selectee is required to complete the process, including induction, and to raise then any constitutional objections to his induction by resort to habeas corpus.[2] See *United States* v. *Flakowicz,* 146 F. 2d 874 (C. C. A. 2), petition for certiorari pending, No. 1072; *Sirski* v. *United States,* 145 F. 2d 749 (C. C. A. 1); *Biron* v. *Collins,* 145 F. 2d 758 (C. C. A. 5); *Klopp* v. *United States,* No. 9803, decided March 26, 1945 (C. C. A. 6); *Fijii* v. *United States,* No. 2973, decided March 12, 1945 (C. C. A. 10). The Government's position is well stated in a recent opinion by Judge Parker speaking for the Circuit Court of Appeals for the Fourth Circuit in *Smith* v. *United States,* No. 5329, decided April 4, 1945, a copy of which is attached hereto as Appendix B, *infra,* pp. 15–25.

The excerpts from *Billings* v. *Truesdell,* 321 U. S. 542, relied upon by petitioner do not limit the *Falbo* case in the manner suggested. In the

[1] See also the concurring opinion of Mr. Justice Douglas in *Hirabayashi* v. *United States,* 320 U. S. 81, 108–109.

[2] That habeas corpus is an effective remedy is illustrated by *United States ex rel. Reel* v. *Badt,* 141 F. 2d 845 (C. C. A. 2); *United States ex rel. Lynn* v. *Downer,* 140 F. 2d 397 (C. C. A. 2), certiorari denied, 322 U. S. 756; *United States ex rel. Phillips* v. *Downer,* 135 F. 2d 521 (C. C. A. 2); *Benesch* v. *Underwood,* 132 F. 2d 430 (C. C. A. 6); *Harris* v. *Ross,* 146 F. 2d 355 (C. C. A. 5); *Application of Greenberg,* 39 F. Supp. 13 (D. N. J.); *United States ex rel. Bayly* v. *Reckord,* 51 F. Supp. 507 (D. Md.).

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Billings case the Court was concerned with whether a person finally accepted for military service, but who refused to be inducted, was subject to military or civilian jurisdiction. The decision that he was subject to the latter did not enlarge the authority of the civilian criminal court to inquire into the propriety of the Selective Service classification.[3]

2. Even if we assume, *arguendo*, that after a selectee's acceptability to the Army has been finally determined the propriety of his Selective Service classification may be collaterally challenged in a criminal prosecution, we submit that petitioner had not been finally determined to be acceptable at the time when he refused to complete the process at the induction station, and that he therefore has not brought himself within the rule for which he contends.

The question presented is one of fact, whether petitioner completed the Selective Service process short of induction and was found acceptable by

[3] In this connection, the court below said (R. 328):

"* * * The Billings case decided one question only and that was that the army did not have jurisdiction over Billings until he had been "actually inducted," and in that case although the process had gone much farther than in the present case, yet he had not been inducted within the meaning of the Act and was, therefore, not subject to a trial by the army. We think it clear that the Supreme Court did not intend in the Billings case to modify or enlarge upon the Falbo decision which specifically holds that the defense here urged could not be considered by a court in the trial of a criminal indictment brought for violation of the selective service process."

the Army. In this respect it may be noted that petitioner was required to undergo substantially the same processing as was Falbo. Both were given pre-induction physical examinations, which they passed. Thereafter, petitioner was ordered to report for induction; Falbo was ordered to report for work of national importance. Falbo still had to be accepted by the Civilian Public Service Camp to which he was assigned, and petitioner still had to be accepted at the induction station.[4] Major Bellis, who was the commanding officer at the induction station to which petitioner was ordered to report, testified (R. 30–32) that there were various stations at the induction center to which petitioner was required to go for processing and that only after he had completed all these steps would he have been acceptable for actual induction. As we have shown (*supra,* pp. 5–6), petitioner withdrew from the processing before it was completed. Among the questions which petitioner was yet required to answer, at the point in the process when he withdrew, was one concerning prior military service (R. 31). For example, if the information obtained at that point disclosed that petitioner previously had been dishonorably discharged from the Army or that he had been discharged because he was inapt, he probably would have been unacceptable to the Army. See Army

[4] The procedure at the time that Falbo was being processed is set forth at pp. 44, 56 of the Brief for the United States in that case (No. 73, October Term, 1943).

Regulations 615–500, Section 13 (b) (2) and (c) (1), which provide that in most instances such a person shall not be inducted; see also R. 36. Major Bellis testified that without furnishing the induction officials this data required of him, petitioner was not acceptable to the Army (R. 33–34). Petitioner not only did not do this, but he also failed to complete the last three steps in the process, short of induction (R. 35). Major Bellis testified categorically that petitioner had not been accepted by the Army (R. 37). By his conduct petitioner has thus placed himself in a position where his acceptability to the Army has not yet been finally determined. This being so, he has not, even under his view of the law, completed the selective process and therefore was not entitled to attack his Selective Service classification in his criminal trial. In this respect, his position is no different than Falbo's.

3. As the petition for a writ of certiorari states (Pet. 35–37), the other contentions which petitioner mentions but does not argue have been previously urged either in the *Falbo* case or on petitions for writs of certiorari in *Lohrberg* v. *Nicholson,* No. 884, and *Clayton* v. *United States,* No. 886, October Term, 1943, certiorari denied, 322 U. S. 744–745. The Government's views in

opposition are fully stated in our briefs in those cases.[5]

CONCLUSION

Petitioner was not entitled to attack his Selective Service classification in his criminal trial. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

APRIL 1945.

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[5] In evaluating petitioner's contention it may be noted that petitioner was finally classified I–A by his board of appeal on a *de novo* consideration of his case, after he had specifically declined exemption as a conscientious objector. Since the board of appeal, not the local board, was the final classifying agency, petitioner had no standing to complain unless he could show that the board of appeal acted arbitrarily in classifying him. See *Bowles* v. *United States*, 319 U. S. 33; *Falbo* v. *United States*, 320 U. S. 549, 555 (concurring opinion). His grievance as to the board of appeal was not as to its procedure but as to its decisions with respect to the admission and weight of the evidence.

APPENDIX A

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311), provides in part:

> Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *

The Selective Service Regulations provide in pertinent part:

> *622.44 Class IV–D; Minister of religion or divinity student.* (a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).
>
> (b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister

of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

* * * * *

626.1 Classification not permanent (a) No classification is permanent.

(b) Each classified registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

* * * * *

633.21 Duty of registrant to report for and submit to induction. (a) When the local board mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is

postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant: (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board.

* * * * *

APPENDIX B

United States Circuit Court of Appeals, Fourth Circuit

No. 5329.

LOUIS DABNEY SMITH, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia

(Argued March 12, 1945. Decided April 4, 1945.)

Before PARKER, SOPER and DOBIE, Circuit Judges

Hayden C. Covington (Curran E. Cooley and Grover C. Powell on brief) for Appellant, and Louis M. Shimel, Assistant U. S. Attorney, Irving S. Shapiro, Attorney, Department of Justice, and Henry H. Edens, Assistant U. S. Attorney, (C. N. Sapp, U. S. Attorney, and Nathan T. Elliff, Special Assistant to the Attorney General, on brief) for Appellee.

PARKER, *Circuit Judge:*

This is an appeal from a conviction and sentence under an indictment charging violation of the Selective Training and Service Act of 1940, 50 USCA Appendix sec. 301 et seq., in failing to report for induction pursuant to the order of a

local draft board. Defendant is a member of the sect known as Jehovah's Witnesses and claims exemption from the provisions of the Act on the ground that he is a minister of religion. This claim was denied by the local board and he was classified 1–A and ordered to report for induction. The appeal presents two questions: (1) whether the trial court erred in refusing to direct a verdict for defendant on the facts relating to the refusal to report, and (2) whether the court erred in excluding evidence as to the ministerial status of defendant. Both questions, we think, must be answered in the negative.

The facts with respect to defendant's failure to report are as follows: Defendant was ordered by the draft board to report to the board at its office in Columbia, S. C., for induction at 8:30 A. M., September 30, 1943. He made up his mind not to report and so notified his father, who was anxious that he report and be inducted. His father arranged with a state magistrate and two local officers to take defendant by force and carry him to the induction center at the time fixed for induction. On the morning of September 30th, defendant, who lived two miles from the office of the board where he was required to report, was making no effort to report but, between 8 and 8:30 in the morning, was at his home engaged in shaving, and intending thereafter, not to report to the draft board, but to a United States Commissioner and explain why he had not complied with the board's order. While he was so engaged, the magistrate and officers who had been employed by his father arrived at his home and by a show of

force compelled him to go with them to the induction center at Fort Jackson near Columbia, S. C., where they turned him over to the officers of the army charged with the duty of inducting draftees. Defendant notified these officers that he was a minister of the Gospel and that he refused to be inducted into the army. He was finger printed and examined by them, but refused to take an oath or go through the induction ceremony, protesting throughout the proceedings that he would not be inducted.

At the conclusion of the induction ceremony in which other draftees participated, defendant was notified that he was in the army, notwithstanding his refusal to be inducted. He was granted a three weeks leave along with the other draftees and was ordered to return to Fort Jackson three weeks later. He returned in accordance with this order but refused to put on the army uniform or obey orders. He was tried by a court martial for disobedience of orders and sentenced to a term of imprisonment but, after the decision in *Billings* v. *Truesdell,* 321 U. S. 542, was released on habeas corpus. He was then indicted in the court below for failure to report for induction as ordered by the draft board.

Upon the facts as stated, there was no error in refusing to direct a verdict of not guilty; for defendant was guilty, on his own admissions, of failing to report for induction as ordered by the board. Not only does he admit that he did not intend to report and remained at home when he would necessarily have been on his way to the board's office if he had intended to comply with

its order, but also that, after he had been forcibly carried to the place of induction, he persistently maintained an attitude of defiance and repeatedly stated that he would not be inducted. To report for induction means to present oneself not only at the appointed place but also in readiness "to go through the process which constitutes induction into the army." *United States* v. *Collura,* 2 Cir. 139 F. 2d 345, approved in *Billings* v. *Truesdell,* 321 U. S. 542 at 557. Certainly one who has made up his mind not to report for induction and who, after having been dragged by force to the induction center, persistently refuses to go through the process of induction, cannot be said to have reported for induction as ordered by the board, within any possible meaning that can be given to that language.

Defendant makes two arguments which are in large measure inconsistent with each other. One is that the forcible seizure made it impossible for him to report to the board and thus excuses the failure to report; the other, that he was actually present at the induction center and thus substantially complied with the order of the board. A forcible seizure which made it impossible to comply with the board's order would doubtless be a defense; but nothing of the sort is involved here. The seizure made it, not impossible, but possible, for defendant to comply; and, with the opportunity for compliance at hand, he failed to avail himself of it. Likewise, presence at the induction center, rather than at the Board's office, would doubtless be sufficient compliance on the part of one who was attempting to comply with the order to report for induction, but not on the part of one who had been

carried there against his will and who, being there, persistently refused to be inducted. One ordered to report for induction who presents himself at the place designated with the statement that he does not intend to be inducted at all, can hardly be said to have reported for induction. A fortiori, one who is present at the place of induction only because he is carried there by force, and who defiantly refuses induction throughout the period of his presence, cannot be said, in any reasonable sense, to have reported for such purpose. This should be so obvious as not to require statement.

Directly in point is the decision of the Second Circuit in the case of *United States* v. *Collura, supra,* cited with approval by the Supreme Court in *Billings* v. *Truesdell, supra.* In that case, where the charge was failure to report for induction, the draftee appeared at the induction station at the appointed hour but stated that he refused to be inducted unless given a guarantee against compulsory vaccination. In affirming a conviction the court said, 139 F. 2d at 345:

"Obviously the duty to report for induction means more than putting in an appearance at the induction station. The selectee must not only appear but must be ready to go through the process which constitutes induction into the army. Admittedly the appellant did not report for induction, but reported for the purpose of making a bargain with the military authorities and entering the army only if the terms agreed upon were satisfactory to his personal views as to vaccination."

In the case at bar the draftee did not report for the purpose of making a bargain with the military

authorities as a condition of induction. He did not report at all. He was forcibly taken to the induction station and, being there, refused unconditionally to be inducted. See also *United States* v. *Longo,* 3 Cir. 140 F. 2d 848.

On the second question, we think it clear that the trial court was correct in excluding evidence as to the alleged ministerial status of defendant and refusing to charge the jury with regard thereto. Whether the defendant was entitled to exemption from military service or not on the ground that he was a minister of religion, this was a question of fact committed to the determination of the draft board, with appeal to the appeal board and in a limited number of cases to the President, but with no provision for review by the courts. *United States* v. *Grieme,* 3 Cir. 128 F. 2d 811, 814–815. It was his duty to comply with the board's orders; and, in a prosecution for failure to do so, no defense based on the invalidity of the orders can be entertained. *Falbo* v. *United States,* 320 U. S. 549. Compliance with the board's orders includes submitting to induction, which is the last step in the process leading to induction; for "the order of the local board to report for induction includes a command to submit to induction." *Billings* v. *Truesdell,* 321 U. S. 542, 557. As said by the Supreme Court in the case last cited:

"But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board. It must be remembered that sec. 11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of

him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.' He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States* v. *Collura, supra. The order of the local board to report for induction includes a command to submit to induction.* Though that command was formerly implied, it is now express. The Selective Service Regulations state that it is the 'duty' of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished,' and *'to submit to induction.'* [Italics supplied.]

Defendant argues that he has exhausted the administrative process, as required by the *Falbo case,* when he has submitted to physical examination and been accepted by the military authorities, and that it is then open to him, if charged with refusal to obey the board's order with respect to the final matter of submitting to induction, to attack the validity of the order by showing that the board had classified him unreasonably. The trouble with this position is that the administrative process is not exhausted until the order of the board is complied with, which, as we have seen, embraces submitting to induction. When the *Billings case* is considered in connection with the *Falbo case,* there can be no question as to the correctness of this conclusion. In the *Billings case,* the court, after using the language which we have quoted above, goes on to say:

"Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. * * * These considerations together indicate to us that a selectee becomes 'actually inducted' within the meaning of sec. 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

Following the procedure prescribed thus embraces undergoing induction; and not until this has been done may the legality of classification be challenged. *United States* v. *Rinko,* 7 Cir. 147 F. 2d. 1; *United States* v. *Flakowicz,* 55 F. Supp. 329, Aff. 2 Cir. 146 F. 2d 874. The inductee may, of course, apply for habeas corpus as soon as his induction into the army is completed, and need not wait until he is court-martialed for disobedience of military orders.

This court was of opinion when the cases first arising under the Act came before us that the invalidity of an order of classification arising from the denial of due process might be asserted as a defense to a prosecution for failure to obey the order. See *Baxley* v. *United States,* 134 F. 2d 998, 999; *Goff* v. *United States,* 135 F. 2d 610. A different view, however, had been taken by the Circuit Court of Appeals of the Third Circuit in *United States* v. *Grieme,* 128 F. 2d 813, 815, where that court said:

"We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts."

In the *Goff case, supra,* we expressly referred to the *Grieme case,* and, in justification of not following it, said: "It would seem * * * that the total invalidity of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order." The Supreme Court, however, in the *Falbo case,* after referring to the conflict of view between the *Goff* and *Grieme cases,* adopted the view of the latter; and in his concurring opinion in *Hirabayashi* v. *United States,* 320 U. S. 81, 108, 109, Mr. Justice Douglas referred to the rule of the *Grieme case* as settled law, saying: "There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act *and to refuse or fail to be inducted.* He must submit to the law. But that line of authority holds that after induction he may obtain through habeas corpus a hearing on the legality of his classification by the draft board." [Italics supplied.] If

habeas corpus is the remedy by which the validity of classification is to be tested, then, unquestionably, submission to induction is a necessary part of the preliminary process; for not until the inductee is actually in the army is he deprived of his liberty so that habeas corpus will lie.

In the *Goff case* we were impressed with the thought that the validity of an order might be challenged wherever failure to comply with it was alleged. The Supreme Court has taken the view, however, that considering the dangers which might flow from delay in time of war, a reasonable interpretation of the Selective Service Act requires that orders of the draft board be complied with and all administrative remedies thereunder be exhausted before they may be challenged in the courts. This is in accord with the holding that the validity of OPA regulations may be challenged only after administrative procedures have been exhausted, and then only in a particular court. Cf. *Yakus* v. *United States,* 321 U. S. 414, 427–430. Among the advantages in cases such as this of limiting the remedy of the draftee to habeas corpus proceedings commenced after the administrative process has been completed, is that unnecessary delays in the raising of the army are avoided and questions which are primarily constitutional in character are heard before a judge without the distractions and uncertainties likely to accompany a criminal jury trial. Constitutional rights of citizens must, of course, be preserved in war as well as in peace; but the procedure outlined in the *Falbo* and *Billings* cases enables the courts to preserve them without unduly interfering with the war effort.

An additional reason for sustaining the action of the trial court is that there was nothing tendered by defendant sufficient to show such a denial of due process as would result in invalidity of the draft board's order. It was certainly for the board to say whether a college student eighteen years of age, majoring in engineering, and claiming to be a minister of religion merely because he distributed Bible literature and conducted Bible studies, was a minister of religion within the meaning of the Selective Service Act. See 53 F. Supp. 583–584. The decision of the board was affirmed by the appeal board and by the President; and there was nothing offered to show that in any of the proceedings defendant was denied any constitutional right. Even if the rule of the *Goff case* be applied, therefore, there was no error; for it must be remembered that, with respect to the right to assert the invalidity of the board's order as a defense, we said in that case: "This does not mean that the court in a criminal proceeding may review the action of the board. That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

A true copy.
Teste:

----------*Clerk,*
U. S. Circuit Court of Appeals, 4th Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1948

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. 1071

■

ALEX RINKO, *Petitioner*

v.

THE UNITED STATES OF AMERICA

■

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner's
PETITION FOR REHEARING

HAYDEN C. COVINGTON
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. 1071

■

ALEX RINKO, *Petitioner*
v.
THE UNITED STATES OF AMERICA

■

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner's
PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Comes now petitioner, Alex Rinko, and moves this Court to reconsider its judgment of April 30, 1945, denying the petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

All *Available* Administrative Procedure Exhausted

As grounds therefor, petitioner would show that the Government in its memorandum in opposition to the petition for writ of certiorari represented that petitioner had not completed the steps in the induction process to the point where he was unqualifiedly acceptable to the army, and on the basis of this representation argued that petitioner was not entitled to challenge the legality of the

selective process under the ruling of this Court made in *Falbo* v. *United States,* 320 U. S. 549. This argument, however, overlooks the fact, indisputably established in the record, that petitioner was not given an opportunity to complete the steps which the government claims were omitted and hence no further remedies or steps were available to him. Petitioner merely stated that he could not and would not take the oath of induction. Upon learning of this, the induction officials removed him from the line of inductees. Thus from the time of reporting at the induction station to the time he left, he obeyed every direction, order and command of the induction officials, save and except that he declined to take the oath of induction. At no time did he refuse to complete any of the available administrative steps short of the induction ceremony itself. A brief examination of the record will show this to have been the situation.

After successfully completing his preinduction physical examination, and after his classification was finally settled by the Board of Appeals as I-A, petitioner was ordered to report at the local board to receive transportation to the induction station, where a final examination was to be held and, if successfully completed, the induction ceremony was to take place. Petitioner complied with this order in its entirety.

Upon arrival at the induction center it was petitioner's duty under the law to obey the commands and instruction of the officials on duty there. Consequently, he took his place with the group of inductees then being processed and started along the line of desks or "stations" where separate steps of the examination were to be completed. The process was explained in detail by Major Charles W. Bellis, Commanding Officer of the induction center. [30-31] The last four steps in the induction process were explained as follows:

> "After the roster desk came another large, long desk, with two sides, with 18 girls, that was the maxi-

mum capacity, 18 typists, sitting en banc, nine on one side and nine on the other, and the line split at that point, and there Section 3 of the 221 form [Report of Physical Examination and Induction] was filled out.

"Section 3 concerns previous military service, name of the nearest relative, normally the mother, the person to be notified in case of an emergency, the beneficiary and so forth; and beyond that station was the signature table where each inductee signed his name, stating that the information he had given was correct.

"Then came the fingerprint table, and after that the final checking table where the records were checked thoroughly for omissions and errors.

"After that table was a room known as the ceremonial room the place of induction. After they passed through the induction room, they were sent over to barracks in another part of the post." [31-32]

There is no dispute in the record as to what took place when petitioner reached the stenographers who were to fill out Section 3 of Form 221. The typist asked what his occupation was. Petitioner advised her that he was an ordained minister and that he had been wrongfully reclassified from IV-D to I-A by his local board. Thereupon the typist told him that there must be some mistake in his case and took him out of line to see the commanding officer in charge of the induction center. [125] Major Bellis, the commanding officer, directed petitioner to sit down beside his desk and explain his objections. [42, 125] Petitioner then explained in detail. He advised Major Bellis that since he was a minister of the gospel he was exempt from military training and service and that he would not take the oath of induction for the reason that he was not obliged so to do under the law. [41, 125, 131] After some discussion, Major Bellis then directed petitioner to report to Captain Girard, since it was then too late to proceed further with the induction process. Captain Girard was responsible for providing accommodations in the barracks for men who were tem-

porarily at the induction center and who could not be processed immediately. [59] Petitioner reported to this officer and was given overnight accommodation in the army barracks. [133-134] Captain Girard directed petitioner to report back to Major Bellis the next day. [133] Upon reporting back to Major Bellis the following morning, petitioner again stated that he would not submit to induction. [34] A statement was then prepared for petitioner's signature, setting forth this refusal. [51, 134] After signing this statement before two witnesses, petitioner was directed to leave the military reservation. [51]

It will be noted that as soon as the Commanding Officer discovered that petitioner did not intend to take the oath, he never thereafter offered petitioner the opportunity of completing the last three steps of the induction procedure immediately preceding the oath ceremony. This was specifically admitted by the Commanding Officer:

> "Now, then, did you at any time tell this man that it was necessary for him to complete Form 3, and then be fingerprinted and then go into the ceremonial room; did you tell him that? A. No, I did not." [45]

Moreover, petitioner testified positively that he was never given opportunity to continue on through the remaining three stations before the ceremonial room was reached for the administration of the oath. [131, 134] In fact he expressed to the Commanding Officer his willingness "to do everything but take the oath" [135], but nevertheless he was not requested to do anything further. Petitioner certainly had no means of knowing that there were three more stations before the ceremonial room was reached. Thus it is plain and undisputed that petitioner went as far as it was possible for him to go in exhausting his administrative remedies.

That there may have been some additional steps short of actual induction which were not completed cannot be relied upon by the Government as a valid ground for deny-

ing petitioner's right to defend against the indictment, when those steps were beyond his reach. The first requirement of the rule regarding the exhaustion of administrative remedies is that the remedy should be available. No argument is needed to demonstrate the thorough soundness of this rule. *It is submitted that petitioner completely exhausted his administrative remedies as far as it was possible for him to do.* Thus, the rule in *Falbo* v. *United States,* 320 U. S. 549, cannot be applied to this case.

It will be noted that the "administrative remedies", which the Government claims petitioner failed to exhaust, in actuality cannot thus be designated for they do not offer any substantial opportunity to the registrant to adjust his differences with the administrative agency. Had petitioner been able to complete the process at each of the three remaining stations, he would only have been required to furnish routine registration information relative to his personal status. Certainly the taking of his fingerprints, the naming of a person to be notified in an emergency, and the designation of a beneficiary cannot be termed "administrative remedies". The Government, however, suggests that one of the questions he would have been asked dealt with his previous military service, and had he answered that he had previously been dishonorably discharged from any branch of the military service, he would have been forthwith rejected. But petitioner had already indicated on his selective service questionnaire (Form 40) that he had had no previous military service. (*Cf.* [174]) Had he indicated on his questionnaire that he had been dishonorably discharged, he would never have been placed in an inductible classification under the Selective Service Regulations. It is significant that the government did not contend that petitioner had been dishonorably discharged from the military service.

The Commanding Officer at the induction center did not insist that petitioner complete the procedure at the last three stations before the final induction ceremony. He did not do so because it would have accomplished no useful pur-

pose. If petitioner would not take the oath of induction, then the army had no occasion to obtain from him the information that would have been required at the last three stations. The conduct of the Commanding Officer was only reasonable under the circumstances. It is the argument of the Government that is unreasonable, because the procedure it insists petitioner should have gone through would have been empty, idle and useless. But in any event petitioner, who had no means of knowing of the additional stations before the induction ceremony was reached, ought not be denied his right to defend against the indictment on this ground.

Conclusion

Wherefore petitioner prays that the order and judgment, heretofore entered on April 30, 1945, denying the petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, be set aside and held for naught and that upon reconsideration the petition heretofore submitted be granted. Petitioner prays for such other relief as he may show himself justly entitled to in the premises.

ALEX RINKO, *Petitioner*

By HAYDEN C. COVINGTON
Counsel for Petitioner

Certificate

I, the undersigned counsel for petitioner, do hereby certify that the foregoing petition for reconsideration is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner